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No. 87-1206

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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60 pp

QUESTION PRESENTED

Whether 28 U.S.C. 1442(a)(1) allows a federal employee charged with committing a traffic offense while on duty to remove the ensuing prosecution to federal court where the employee does not allege a defense to the charges based upon any right, duty, privilege, or immunity provided under federal law?

TABLE OF CONTENTS

Statement 2

Summary of Argument 3

Argument 5

I. Congress Always Intended To Require A Federal Defense For Removal 5

A. Reading section 1442(a) as a whole establishes that Congress required a federal defense for removal 5

B. The legislative history of section 1442(a)(1) demonstrates that Congress always required a federal defense for removal 7

1. Congress enacted the first federal official removal statute solely to provide an efficient mechanism to transfer suits challenging federal authority to federal court before trial 7

2. Subsequent reenactments of the federal official removal statute maintained the federal defense requirement 10

3. The addition of section 1442(a)(3) in 1916 is compelling evidence that Congress maintained the federal defense requirement 14

4. Congress did not eliminate the federal defense requirement when it enacted the present statute 18

5. The Federal Drivers Act is further evidence that Congress still requires a federal defense for removal 19

6. This Court has held that section 1442(a)(1) is not *in pari materia* with civil rights laws 20

II. This Court has never abolished the federal defense requirement 21

A. This Court's decision in *Cleveland v. McClung* is consistent with the federal defense requirement 21

B. The "causal connection" test employed in *Willingham* was developed to provide a remedy for harassment and assumes the federal defense requirement 23

C. The Third Circuit's decision abolishing the federal defense requirement ignored Congressional intent and misinterpreted *Willingham* 34

D. This Court's *dicta* in *Arizona v. Manypenny* supports the federal defense requirement 35

III. Article III prohibits removal of cases lacking a federal defense 36

A. Even the broad reading of "arising under" jurisdiction propounded in *Osborn v. Bank of United States* does not confer jurisdiction in this case 37

B. This Court should decline petitioners' invitation to adopt protective jurisdiction as a basis for federal jurisdiction over traffic tickets 42

IV. This Court should refuse to create a special federal court for federal employees at the expense of State sovereignty 46

Conclusion 50

TABLE OF AUTHORITIES

Cases:

Arizona v. Manypenny, 451 U.S. 232 (1981) 13, 35, 36
Barr v. Matteo, 360 U.S. 564 (1959) 30
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Buck v. Colbath, 70 U.S. 334 (1865) 12, 16
City of Aurora v. Erwin, 706 F.2d 295
(10th Cir. 1983) 47-48
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119 U.S. 454 (1886) 21-22
Colorado v. Symes, 286 U.S. 510 (1932) . . . 17, 18, 20, 27, 34
Commonwealth of Pennsylvania v. Newcomer,
618 F.2d 246 (3d Cir. 1980) 33-35
Davis v. South Carolina, 107 U.S. 597 (1882) 14, 16, 25
Ellis v. Railway Clerks, 466 U.S. 435 (1984) 36
Erlenbaugh v. United States, 409 U.S. 239 (1972) 20
Fourco Glass Co. v. Transmirra Prod. Corp.,
353 U.S. 222 (1957) 18
Garcia v. United States, 469 U.S. 70 (1984) 6
Gay v. Ruff, 292 U.S. 25 (1934) 12, 15-17, 20
Georgia v. Grady, 10 Fed. Cas. 245 (1876) (No. 5,352) . . 13
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In re Debs, 158 U.S. 564 (1895) 45
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Jarecki v. Searle & Co., 367 U.S. 303 (1961) 6
Kelly v. Robinson, 479 U.S. __, 107 S.Ct. 353 (1986) 46
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96 U.S. 199 (1887) 38
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270 U.S. 9 (1926) 2, 18, 20, 23-33, 35, 49

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(10th Cir. 1967), *reversed in*
Willingham v. Morgan, 395 U.S. 402 (1969) 31
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v. Marathon Pipeline Co. and United States,
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22 U.S. 738 (1824) . . . . . 9 ,10, 36-39, 43
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813 F.2d 960 (9th Cir. 1987) 2, 36, 40, 49
People of the State of California v. Morgan,
743 F.2d 728 (9th Cir. 1984) 49
Reiter v. Sonotone, 442 U.S. 330 (1979) 6
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21 Fed. Cas. 229 (1857) (No. 12,249) 11
Screws v. United States, 325 U.S. 91 (1945) 20
Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) 38
State of Alabama v. Peak, 252 F. 306 (D. Ala. 1918) 25
Tennessee v. Davis,
100 U.S. 257 (1880) 13, 16, 20, 24, 25, 34, 45
Texas & P.R. Co. v. Cody, 166 U.S. 606 (1897) 38
Textile Workers Union v. Lincoln Mills,
353 U.S. 448 (1956) 43-45
The Justices v. Murray, 76 U.S. 274 (1869) 11, 20
The Mayor v. Cooper, 73 U.S. 247 (1867) 11, 20
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Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480 (1983) 37, 42, 44
Virginia v. Felts, 133 F. 85 (C.C. Va. 1904) 48
Walters v. National Assn. of Radiation Survivors,
473 U.S. 305 (1985) 18
Westfall v. Erwin, 484 U.S. __,
108 S.Ct. 580, 98 L.Ed. 2d 619 (1988) 30, 41
Willingham v. Morgan, 395 U.S. 402 (1969) 14, 23, 28-35, 41
Younger v. Harris, 401 U.S. 37 (1971) 46

United States Constitution and statutes:

U.S. Const. Art. 1, section 8 43
U.S. Const. Art. III, section 2 . . . . . 4, 13, 36-40, 42-44
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

This Court is presented with two otherwise ordinary traffic cases. Petitioner Shabbir A. Ebrahim was given a traffic ticket for speeding and failing to yield after he struck a police car with the mail truck he was driving. Petitioner Kathryn Isabella Mesa was charged with misdemeanor vehicular manslaughter after she struck and killed a bicyclist with the mail truck she was driving.

Each mail carrier filed a petition for removal based solely upon their having been federal employees on duty when the incidents occurred. Neither petitioner alleged that his/her actions were justified by federal law. There has been no suggestion that these prosecutions were motivated by animus toward federal officials or federal law.

The United States District Court for the Northern District of California simultaneously granted the petitions and denied the State of California's motions for remand. California sought review by the Ninth Circuit Court of Appeals by direct appeal and mandamus.

The Ninth Circuit held that mandamus was available to challenge the District Court's decision, and petitioners do not challenge that ruling. The Ninth Circuit found that removal was prohibited by this Court's decision in *Maryland v. Soper (No. 1)*, 270 U.S. 9, 33-35 (1926), which required that the employee have alleged in his petition a defense to the state charges based upon federal law. *People of the State of California v. Mesa*, 813 F.2d 960 (9th Cir. 1987). This Court granted certiorari.

SUMMARY OF ARGUMENT

Petitioners seek to expand federal jurisdiction radically at the expense of State sovereignty and common sense. Petitioners' theory would allow federal employees to force local prosecutors to travel hundreds of miles from county seats to federal courthouses to contest traffic tickets and other criminal offenses completely unconnected with federal law or authority. The tactical advantage of such a procedure will ensure its use, and create a separate criminal court for federal employees. District courts will be burdened with new cases presenting purely state law issues. Those cases will generate a disproportionate number of appeals because there is uncertainty concerning the proper incorporation of state procedural and substantive law into federal criminal procedure.

Such an expansion of federal jurisdiction would breach this Court's fundamental policy against federal interference with state criminal prosecutions, and is both unnecessary and contrary to the intent of Congress in enacting section 1442(a)(1). Petitioners rely upon their construction of other statutes dissimilar in language and heritage to section 1442(a)(1) because the structure and history of section 1442(a)(1) demonstrates that Congress has always required a federal defense for removal. This is not a case where this Court must choose between two plausible statutory constructions based upon the desirability of the result, although the difficulties posed by creating a separate criminal court for federal officials would tip the balance in favor of California. Rather, petitioners' construction of section 1442(a)(1) renders both section 1442(a)(3) and the Federal Drivers Act (28 U.S.C. 2679(b)) superfluous.

It also ignores the distinction made by Congress between "under color of office" and "in performance of duties". A chronological view of the legislative history illuminates that distinction and demonstrates that Congress has always intended to require a federal defense under section 1442(a)(1).

When it enacted the first federal official removal statute, Congress only intended to protect federal law against defiance or misinterpretation by State courts. Congress did not provide for removal of all torts and petty crimes committed while on duty, as those cases did not present a challenge to federal law. Moreover, that first statute was enacted before it was clear that Article III, section 2, permitted federal jurisdiction over state court judgments presenting *federal* questions. *See Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). Congress would not have provided for removal of cases presenting purely state law issues under those circumstances. Indeed, removal of these cases would still violate Article III because these traffic offenses do not present federal questions.

Petitioners concede that Congress retained its original intent when it enacted subsequent removal statutes. The history of those enactments confirms that Congress intended to protect federal law by requiring a federal defense for removal.

The lack of cases allowing removal confirms that conclusion. There are no reported cases decided before 1980 (when the Third Circuit "reinvented" Congressional intent), allowing removal where the federal employee did not rely upon his enforcement or compliance with federal law as a defense. Certainly officials sued for miscellaneous torts or prosecuted for petty crimes in "hostile" states would have produced

hundreds of reported decisions over 165 years had there been no federal defense requirement. The absence of a case explicitly allowing removal without a federal defense, combined with the absence of such reported decisions, is only consistent with the federal defense requirement.

Finally, the decisions of this Court in both civil and criminal cases uniformly mandate the federal defense requirement once the term "federal defense" is understood as including all cases where the official's defense raises issues of federal law. Petitioners ignore the official's claim of federal immunity in many of those decisions, and are unable to explain this Court's denial of removal to on-duty officials in the remainder.

ARGUMENT

I.
CONGRESS ALWAYS INTENDED TO REQUIRE A FEDERAL DEFENSE FOR REMOVAL

A. Reading Section 1442(a) As A Whole Establishes That Congress Required A Federal Defense For Removal

Section 1442(a)(1) allows removal for suits and prosecutions for acts "under color of office". That

phrase is inherently ambiguous.[1] Petitioners claim it mandates removal of suits and prosecutions for any acts committed by officials in performance of their duties. But reading section 1442(a) as a whole prohibits that construction. Section 1442(a)(3) allows removal to "[a]ny officer of the courts of the United States, for any Act under color of office ***or*** in the performance of his duties" (emphasis added). Terms connected in the disjunctive are to be given separate meanings. *See Garcia v. United States*, 469 U.S. 70, 73 (1984), *Reiter v. Sonotone*, 442 U.S. 330, 339 (1979). Thus, "under color of office" must restrict removal to something less than all acts committed while on duty. The only logical reading of section 1442(a)(1) is that "under color of office" refers to acts which the official seeks to justify or immunize by the laws creating and protecting his exercise of federal authority (i.e. his "office").

In addition, petitioners' reading of the phrase "under color of office" in section 1442(a)(1) must be rejected because it would allow court officers to remove cases based upon any act committed while in performance of their duties under section 1442(a)(1), rendering all of section 1442(a)(3) superfluous. *See Jarecki v. Searle & Co.*, 367 U.S. 303 (1961) (this Court reads statutes as a whole and seeks to give effect to each section).

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[1] Petitioners do not address the "plain meaning" of "under color of office". Rather, they attempt to construe section 1442(a)(1) *in pari materia* with other statutes purportedly united by a common purpose and legacy. AB 9-12, 27. The failure of that attempt is discussed below after examination of the legislative history of section 1442(a)(1).

B. The Legislative History of Section 1442(a)(1) Demonstrates That Congress Always Required A Federal Defense For Removal

The history of the removal statutes set forth below demonstrates that Congress employed removal sparingly, as befits a threat to State sovereignty. From the outset, Congress crafted the removal statutes to protect only certain federal laws from State misinterpretation or defiance. Congress periodically reenacted removal statutes protecting different classes of federal officials only when the laws which those officials enforced were the subject of State hostility. Protecting federal officials who enforced federal law was the only mechanism available to protect the law itself. Congress provided for removal to protect enforcement of federal law, not to allow federal officials to remove all torts or crimes committed while on duty.

1. Congress enacted the first federal official removal statute solely to provide an efficient mechanism to transfer suits challenging federal authority to federal court before trial.

Section 25 of the Judiciary Act of 1789 (1 Stat. 85) provided for removal after trial of state court judgments purporting to invalidate federal law or authority exercised under federal law. There was no provision for removal of cases lacking federal questions. Indeed, when the first federal official removal statute was enacted in 1815, this Court had yet

to rule that federal courts could review *any* state court judgments, even those presenting federal questions. *Compare* Act of February 4, 1815, 3 Stat. 198 ("1815 Act") with *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (decided after Congress enacted the 1815 Act). Congress would not have attempted to expand federal jurisdiction to include cases presenting no federal questions under such circumstances. Rather, the legislative history of the 1815 Act demonstrates that it was only a modest and temporary extension of the Judiciary Act.

The 1815 Act was proposed to protect federal customs agents in their enforcement of federal law against States sympathetic to smugglers during the 1812 War. The only available legislative history for that Act consists of a letter from its proponent, the Secretary of the Treasury. *See* Annals of Congress, 13th Cong., 3d Sess. at 757-61 (also appearing in the American State Papers, 1802-15, Finance, at 881). The Secretary related that the Vermont courts were frustrating the enforcement of federal law by routinely granting civil judgments against customs officials for seizures authorized under federal law. Under the Judiciary Act, decisions in such civil cases could only be removed to federal courts *after* the judgment was affirmed by the highest court in the State. That delay would allow Vermont to forestall review until after the war ended.

The Secretary wanted to allow removal of civil cases before adjudication by any State court. *Id.*, at 760. The Secretary only intended to adjust the Judiciary Act for the duration of the war to allow immediate transfer to federal court of State challenges to federal law authorizing searches and seizures by

customs inspectors. He quoted section 25 of the Judiciary Act as allowing removal of cases "where is drawn in question the validity of an authority, exercised under the United States (as in the case of an official of the customs,) and the decision is against the validity." *Id.*, at 760 (quoting the Judiciary Act). His proposal mirrors the Judiciary Act, except that he suggested that removal occur before trial.

> "A more effectual provision should be made for transferring, from the State courts to the Federal courts, suits brought against persons *exercising* an authority under the United States, so that such suits may be transferred, as soon as conveniently may be, after they are commenced."

Id., at 761 (emphasis added). Congress passed the 1815 Act, which allowed certain officials and those assisting them to remove civil and criminal cases where the charged acts were "agreeable to the provisions of this act, or under colour thereof" until the war ended. 1815 Act, secs. 8, 13. Thus, Congress allowed removal of suits only where the validity of the authority "exercised" by the official was relied upon as a defense. Congress was only worried about preserving federal law. Protecting officials relying upon that law was necessary to ensure its enforcement.[2]

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[2] Although there is no case law construing the 1815 Act, one of the briefs filed in *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), suggests that contemporaries understood that Act to allow removal only when the revenue officer alleged a defense based upon federal law. "A revenue officer may commit a trespass

(continued...)

2. Subsequent reenactments of the federal official removal statute maintained the federal defense requirement

The provisions of the 1815 Act were revived during the next State-Federal conflict, when South Carolina purported to nullify the federal tariff by passing the Nullification Act in 1832. *See* Act of March 2, 1833, 4 Stat. 632, sec. 3 ("1833 Act"). The Senate debate indicates that Congress did not intend to expand federal jurisdiction.[3] The 1833 Act tracked the

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[2](...continued)
while executing his official duties, and *if he justifies under the statutes of the United States, a question will arise under them*, in which an appellate jurisdiction is given to this court, to correct the errors of the state courts. But could Congress give additional jurisdiction to the federal courts, in all suits brought by or against revenue officers?" *Id.*, at 814 (emphasis added).

The absence of case law is also evidence that Congress maintained a "federal question" requirement. A sudden expansion of jurisdiction to encompass all torts committed by federal employees would have sparked litigation well before the brief was filed in *Osborn* in 1824.

[3] Petitioners rely upon Senator Webster's concern that federal officials would not receive a fair trial from jurors who had sworn allegiance to the Nullification Act. AB 13-14. But the Senator did not suggest that federal officials could not receive a fair trial because of universal hostility to federal officials. Rather, he argued that allowing trial in South Carolina's courts would be futile because jurors were sworn to support the Nullification Act in defiance of the federal *law* upon which the official would rest his (continued...)

language of the 1815 Act. Most important, courts understood that a federal defense was required for removal. *See Salem & L.R. Co. v. Boston & L.R. Co.*, 21 Fed. Cas. 229 (1857) (No. 12,249) (official must allege facts in petition demonstrating excuse or justification under the revenue laws).

The next federal official removal statute was enacted during the Civil War. The Act of March 3, 1863, sec. 5, 12 Stat. 756, ("1863 Act") provided for removal where the official acted "by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress." *Id.* This statute by its plain terms required a federal defense.

This Court confirmed that requirement in three cases. In *The Mayor v. Cooper*, 73 U.S. 247 (1867), the Court upheld the constitutionality of the 1863 Act[4] based upon the power of federal courts to hear *federal* questions. *Id.*, *see also The Justices v. Murray*, 76 U.S. 274 (1869) (noting that the 1863 Act only allowed removal of federal questions). In *McKee v. Rains*, 77 U.S. 22 (1870), a United States Marshal was sued for

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[3](...continued)
defense. Thus, removal was needed to "give a chance to the officer to defend himself *where the authority of the law was recognised* (sic)." 9 Congressional Debates, Part II, 22nd Cong., 2d Sess., at 461 (same remarks of Sen. Daniel Webster) (emphasis added), 419 (statute would frustrate attempts by States to preclude an official from "appealing to the constitution and laws under which he acted") (Sen. Dallas), 260 (Sen. Wilkins).

[4] The Court construed the 1863 Act as amended by the Act of May 11, 1866, 14 Stat. 46. The changes to the Act were not significant for the issue presented here.

trespass after entering a dwelling and seizing property pursuant to a writ of execution. This Court rejected his petition for removal under the 1863 Act because "[n]o Act of Congress has been cited from which authority can be derived to the Marshal of any court of the United States to seize the goods of one person for the satisfaction of the debts of another." *Id.*, at 25. Although the Marshal was in performance of his duties when executing a court order, he was denied removal because he could not base his defense upon federal law.[5] Petitioners cannot reconcile *McKee* or the 1863 Act with their theory that Congress always intended to allow removal for acts "in performance of duties."

The next removal statutes were part of internal revenue laws.[6] The Act of July 13, 1866 was the first

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[5] Although the Marshal was also clearly enforcing federal law by enforcing a court order, the 1863 Act required that the official act under authority "derived from the President of the United States, or from an Act of Congress." Court orders were held not to be covered by the Act. *See Buck v. Colbath*, 70 U.S. 334 (1865). As discussed *infra*, at page 14, this problem prompted Congress in 1916 to add section 1442(a)(3) protecting court officers.

[6] The 1833 Act applied only to collection of duties on imports. The Internal Revenue Act of June 30, 1864, ch. 173, section 50, 13 Stat 241 ("1864 Act"), provided that the 1833 Act was to be "taken and deemed as extended to and embracing all cases arising under the laws for the collection of [revenue]." That provision was repealed and replaced in 1866 with a different removal statute. *See* Act of July 13, 1866, ch. 184, section 67, 14 Stat. 98, 171 ("1866 Act"), *Gay v. Ruff*, 292 U.S. 25 n.8 (1934). That Act was codified in 1874 as section 643 of the Revised Statutes, and recodified as Section 33 of the Judicial Code of 1911, 36 Stat. 1097.

statute to use the phrase "under color of office" in providing for removal. Congress did not discuss this new language, and this Court's view of the federal defense requirement did not change. "That the act of Congress does provide for the removal of criminal offenses against the State laws, *when there arises in them the claim of the Federal right or authority, is too plain to admit of denial.*" *Tennessee v. Davis*, 100 U.S. 257, 261 (1880) (emphasis added). Again, this Court required a federal defense.[7]

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[7] This Court upheld the constitutionality under Article III of section 643 of the 1874 Revised Statutes (*see supra* note 6) based upon the assumption that a federal defense was required for removal. Petitioners' theory that *Davis* did not require a defense based upon federal authority is refuted by virtually every sentence of that case. *Id.*, at 271, 272 (allowing removal of prosecutions where "there arises a federal question" or in which "there arises a defence under United States law"). Petitioners argue that *Davis* did not require a federal defense because "self-defense" is a "state-law" defense. AB 19-20, n.7. But petitioner concedes that this Court stated in *Maryland v. Soper (No. 2)*, 270 U.S. 36 (1926), that acts of self-defense are "part of the exercise of official authority." *Id.*, at 42. The official in *Davis* relied upon the federal immunity defense, very much a "common law of 'justification' applicable to crimes committed by federal employees in the performance of their duties." AB n.7, *see Arizona v. Manypenny*, 451 U.S. 232, 236-37 (1981), *In re Neagle*, 135 U.S. 1 (1890), Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U.Pa.L.Rev. 793, 874 n.328 (1965) (*Davis* demonstrates the rule under section 1442(a)(1) that the official must show colorable protection under federal law), Currie, *The Constitution in the Supreme Court, The First Hundred Years, 1789-1889* (1985), 393-94 n.172 (recog[illegible]ng that *Davis* was a federal immunity case).

(continued...)

3. The addition of section 1442(a)(3) in 1916 is compelling evidence that Congress maintained the federal defense requirement

Congress added section 1442(a)(3) in 1916. As discussed above, that amendment allows a court officer to remove civil and criminal actions "for or on account of any act done under color of his office ***or*** *in the performance of his duties as such officer.*" *Id.* (emphasis added). Petitioners' reading of "under color of office" as referring to all acts in performance of duties not only renders section 1442(a)(3) superfluous

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[7](...continued)
Although the district court in *Georgia v. Grady*, 10 Fed. Cas. 245 (1876) (No. 5,352) (AB 20-21) chose to couch the necessary and proper test later set forth in *In re Neagle*, in terms of state law with which the jury might be more familiar, the gravamen of the defense still remains reliance upon federal authority.

The officer in *Davis v. South Carolina*, 107 U.S. 597 (1882), also alleged a federal immunity defense. This Court noted that the official relied upon federal law as justifying his presence at the scene. *Id.*, at 600. The official's petition averred that the shooting occurred only after the fugitive attempted to evade arrest, and that the fugitive's sudden appearance had frightened his horse and caused his firearm to discharge. *Id.*, at 598. Thus, the official alleged that his acts while on duty were necessary and proper because the firearm discharged as a result of his attempt to enforce federal law (i.e. guarding the house when the fugitive emerged). Although this immunity defense might not prevail at trial, it was certainly "colorably" alleged for purposes of removal. *See In re Neagle*, *Willingham v. Morgan*, 395 U.S. 402 (1969) (discussed in a later section in this brief).

as read today, but makes no sense historically.

Petitioners claim that Congress read both phrases as "coterminous." AB 26. But this does not explain why Congress added "in performance of duties" to section (a)(3) if "under color of office" achieved the same result. Nor does it explain why Congress added section (a)(3) at all, instead of simply amending section (a)(1) to include court officers.

This Court's decision in *Gay v. Ruff*, 292 U.S. 25 (1934), indicates that Congress intended both phrases to encompass only those acts justifiable by federal law or authority. Defendant in *Ruff* was a receiver appointed by federal court order to run a railroad. Plaintiff sued the receiver for the death of his son allegedly caused by the negligent operation of a train by railroad employees. The receiver sought removal under section 1442(a)(3) based on his having been a court officer when the incident occurred.

This Court held that the receiver was a court officer for purposes of section 1442(a)(3). *Id.*, at 39. But this Court also noted that the case was *dissimilar* to cases removable under section 1442(a)(3) *because no federal questions were presented.* *Id.*, at 34. (Petitioners' construction would require removal in the absence of a federal question.) This Court denied removal, holding that Congress only intended "in performance of duties" to protect court officers relying upon the federal authority embodied in the court order. *Id.*, at 35, 38-39. Thus, even that broader phrase requires reliance upon federal authority.

This Court also rejected petitioners' construction of the phrase "under color of office", which appears in sections 1442(a)(1) and (a)(3). Petitioners read "under color of office" as allowing removal for all acts

committed while on duty. Under that construction, the receiver in *Ruff* should have been allowed removal because he was accused of negligence in performing his duties. But *Ruff* held that the receiver could not have been acting "under color of office" under section 1442(a)(3) because he had no federal defense. *Id.*, at 39 ("nor is there reason to assume that he will in this case rest his defense on his duty to cause the train to be operated").[8]

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[8] That the two phrases are not "coterminous" is demonstrated by the motive of Congress in adding section 1442(a)(3). Court officers serving arrest warrants for violations of revenue laws could remove to federal court under section 1442(a)(1) by raising a federal immunity defense based upon their duty to enforce those laws. *See Tennessee v. Davis*, *supra*, *Davis v. South Carolina*, *supra*. However, section 1442(a)(1) referred only to revenue laws. Court officers executing court orders where the underlying authority for the order was *not* a revenue law were held to be unprotected by section 1442(a)(1). *See Gay v. Ruff*, 292 U.S. 25, 37-38 (1934). This Court had held that federal law did not protect those court officers when sued in state court for a variety of torts even though those suits were based upon the officer's execution of a court order. *See McKee v. Rains*, *supra*, *Bigelow v. Forrest*, 76 U.S. 339, 348 (1869), *Buck v. Colbath*, 70 U.S. 334, 342-44 (1865). The defense of federal immunity per the revenue laws, and thus removal, was unavailable to those officers.

Congress sought to provide court officers with the same protection afforded to revenue officers *and* to members of Congress. *Ruff*, at 38-39 (quoting House Judiciary Committee report). Since revenue officers were allowed to remove acts committed "under color of office", that phrase was also included within section 1442(a)(3). But additional protection was needed because of this Court's decisions holding that federal law did not provide a defense to suits challenging the marshal's execution of

(continued...)

Only two years before *Ruff*, this Court had construed *section 1442(a)(1)* as prohibiting removal where the federal official failed to present a federal defense. *See Colorado v. Symes*, 286 U.S. 510 (1932). Petitioners suggest that this Court denied removal because the official did not provide enough information to allow the Court to determine if he acted in "proper discharge of his duty". AB 23-24. But the official's detailed narrative established at the very least that he acted in performance of his duties. *Id.*, at 516-17. This Court denied removal because the official failed to establish a federal immunity defense.[9] Petitioners'

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[8](...continued)
court orders. Section 1442(a)(4), added in 1875, allows members of Congress to remove any suit on account of "any act in the discharge of his official duty *under an order of such House*." *Id.* (emphasis added). Congress incorporated this protection of all acts committed pursuant to federal authority into section 1442(a)(3) by adding the phrase "in performance of duties." *Ruff*, at 39.

Had Congress read "under color of office" as protecting all acts committed while on duty (*see* AB 26), then it would not have added another section to subsection 1442(a). Congress simply would have amended section 1442(a)(1) to include court officers. But Congress needed to add protection that petitioners claim was already present. California's reading of the two phrases is the only reading consistent with *Ruff* and the history and intent of the 1916 Act. Petitioners' reading defies common sense by making "under color of office" broader than "in performance of duties".

[9] "The statements of the petition are so vague, indefinite and uncertain as not to commit petitioner in respect of essential details of the *defense* he claims. They are not sufficient to enable the court to determine whether his *claim of immunity* rests on any substantial basis or is made in good faith." *Id.*, at 521 (emphasis

(continued...)

construction of "under color of office" has been refuted repeatedly by this Court.

4. Congress did not eliminate the federal defense requirement when it enacted the present statute

Congress amended section 1442(a)(1) to include "[a]ny officer of the United States or any agency thereof" as part of the Revision of the Judicial Code in 1948. The Reviser's Note to that section states only that the Revision extended the right to remove to all federal employees. Petitioners concede that the extension of protection to all federal employees did not change the character of that protection. AB 16. This Court has repeatedly held that changes in language made during the 1948 Revision are presumed not to have changed the scope and meaning of the statute unless Congress clearly expressed such an intent in the Reviser's Notes. *See Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 226 (1957), *see also Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 318 (1985), *Muniz v. Hoffman*, 422 U.S. 454, 467-74 (1975) (collected authority).

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[9](...continued)
added). As discussed in a later section, this Court in *Maryland v. Soper (No. 1)*, *supra*, required officials seeking to allege an immunity defense to make a complete account of the incident prompting prosecution to ensure that all acts which could form the basis of that prosecution were protected by federal law. In *Symes*, this Court held that the official had failed to give a sufficiently complete account. *Id.*, at 519-20 (citing *Soper (No. 1)*).

5. The Federal Drivers Act is further evidence that Congress still requires a federal defense for removal

Congress in 1961 refuted petitioners' vision of federal official removal when it added the Federal Drivers Act (28 U.S.C. 2679(b)), allowing federal officials to remove *civil* suits arising out of the performance of their duties. The Act provides for removal of civil suits against federal drivers upon certification by the Attorney General that the incident occurred while the official was performing his duties. It does not encompass criminal cases. This section would be superfluous under petitioners' construction of section 1442(a)(1). The Federal Drivers Act was necessary because section 1442(a)(1) does not allow removal in the absence of a federal defense.[10]

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[10] Although the Federal Tort Claims Act (28 U.S.C. 1346) provides for removal of tort suits against the United States pursuant to that Act, plaintiffs could still sue employees individually in state courts until 1961. Congress enacted the Federal Drivers Act to protect those employees against suits alleging negligent driving, which did not give rise to a federal defense. *See* Comment, *Katlein, Administrative Claims and the Substitution of the United States as Defendants Under the Federal Drivers Act: The Catch-22 of the Federal Tort Claims Act?*, 29 Emory L.J. 755, 761-63 (1980).

6. This Court has held that section 1442(a)(1) is not *in pari materia* with civil rights laws

Statutes may be considered *in pari materia* only if they share the same object. *Erlenbaugh v. United States*, 409 U.S. 239, 243-45 (1972). This Court held in *Screws v. United States*, 325 U.S. 91, 111 (1945), that the language "under color of law" in the civil rights statutes cannot be construed *in pari materia* with the phrase "under color of office" in section 1442(a)(1) precisely because the statutes were enacted for different purposes. *Id.*, at 111-12. The civil rights laws were enacted to punish state or federal officials who deprived others of their constitutional rights under the assumption of authority. Insistence that the official had acted within his federal authority would have vitiated the statutory purpose of punishing abuse of power. *Id.* Section 1442(a)(1), in contrast, was enacted to protect federal law by protecting officials relying upon that law in state courts. Restricting removal to cases featuring federal defenses makes sense.

That the dissent would have construed civil rights laws in accordance with section 1442(a)(1) does not help petitioners, since the dissent, *along with the majority*, construed "under color of office" as requiring the official to justify his conduct under federal law. *Id.*, at 111-112, 145-46. Petitioners cannot reconcile *Screws* with their construction of section 1442(a)(1). *See also Gay v. Ruff*, *supra*, *Colorado v. Symes*, *supra*, *Maryland v. Soper (No. 1)*, *supra*, *Tennessee v. Davis*, *The Mayor v. Cooper*, *The Justices v. Murray*, *McKee v. Rains*, *supra*.

II.
THIS COURT HAS NEVER ABOLISHED THE FEDERAL DEFENSE REQUIREMENT

A. This Court's Decision In *Cleveland v. McClung* Is Consistent With The Federal Defense Requirement

When a railroad company holding a lien on certain freight informed customs collectors of that lien, federal law required the collectors to notify that railroad before releasing the freight to a consignee or owner. The collectors were not allowed to release the freight until the owner discharged the lien. *Cleveland C. & c. R.R. v. McClung*, 119 U.S. 454, at 454-55. Plaintiff in *McClung* was a railroad holding a lien on particular goods. Defendant was the customs collector bearing responsibility for notifying plaintiff and holding those goods once they arrived at the station. Plaintiff alleged that defendant had allowed his deputy on prior occasions to release goods to the consignees after collecting the amounts due on the liens. The deputy would then deliver the money to the railroad. Plaintiff complained that the deputy on one occasion had failed to turn over the money, and sought to hold the defendant responsible for the deputy's omission. *Id.*, at 454-55, 461, 462.

Plaintiffs alleged that defendant had failed to adhere to federal law by allowing his deputy to release the goods without notification. *Id.*, at 456. Defendant's petition stated that he had at all times acted "under color of office". After removal, defendant claimed that it was not his duty under federal law to collect money for the lienholders, and that he was

therefore not responsible for his deputy's alleged failure to pay that money to the railroad. *Id.*, at 461. He also claimed that since the money had already been paid and the lien discharged, he had no duty under federal law to notify the railroad or retain the goods. *Id.*, at 458.

This case is confusing because, unlike the instant cases, defendant was accused of violating *federal* law. That allegation necessarily put the interpretation of federal law into issue as a defense. Moreover, while defendant's petition by today's standards was overly cryptic, he alleged a federal defense by stating in effect that he defended the charges based upon his duties (or lack thereof) under federal law. *Id.*, at 456. Thus, the Court proceeded to evaluate the case against the collector in those terms.

> The real question here is, therefore, whether the collection of the carrier's charges was a part of the official duty of the collector. If it was, the collection by the deputy was an official act, and the principal officer is liable accordingly.

Id., at 462. The Court found that the collector's federal defense was valid, and affirmed the lower court's instruction to the jury on that defense. *Id.*, at 463. The Court also stated that the defendant's denial of the allegation did not vitiate his right to removal. That ruling was correct because removal depends upon the allegations in the petition; officials may rely upon any defense at trial. The instant cases present no federal issues because petitioners do not defend their allegedly negligent driving by recourse to federal law.

B. The "Causal Connection" Test Employed in *Willingham* Was Developed To Provide A Remedy For Harassment And Assumes The Federal Defense Requirement

Petitioners' interpretation of this Court's recent authority is easily stated. Petitioners observe that *Willingham v. Morgan*, 395 U.S. 402 (1969), granted removal in a civil case where the official had alleged only that he was on duty. They quote the language in *Willingham* stating that the official was entitled to removal because he had established a "causal connection" between the charged act and his official authority. AB 17. And they note that section 1442(a)(1) does not distinguish between civil and criminal cases on its face. Petitioners conclude that this "causal connection" test allows them removal in these criminal cases because they too alleged only that they were on duty.

California *agrees* that the test for removal is identical for civil and criminal cases, but suggests that petitioners misunderstand the "causal connection" test. As discussed herein, this Court has always held that a federal defense is required for all cases. Petitioners' argument collapses because they assume that the "causal connection" test outlined in *Willingham* is the exclusive test for removal. But that test already assumes that the federal official attempts to justify his conduct by relying upon federal law. The "causal connection" test only defines what facts must be alleged to put that federal defense into issue. This distinction is critical and is illustrated by *Maryland v. Soper*, 270 U.S. 9 (1926) ("*Soper (No. 1)*").

The "causal connection" test arose out of the

problem posed by petitioners: the official who is harassed by State authorities attempting to frustrate Federal policy. *See* AB 7, 8, 27, 29-30. Petitioners' suggestion that officials may remove prosecutions without admitting having committed the charged act and alleging that the act was justified under federal law is not new. *Cf.* AB 6, 8, 22-23, 31. But the suggestion arose in a different context.

It was assumed that the official had to allege a defense to the charges based upon federal law. *See Tennessee v. Davis*, *supra*. However, occasionally an official would be disabled from pleading a federal defense to the prosecution by the usual method, which was to admit having committed the charged act and to justify those acts under federal law. This occurred when the official had no knowledge of the incident prompting the prosecution.

In *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926), prohibition agents discovered a homicide victim while raiding an illegal still. They reported their discovery to local authorities and were promptly arrested for murder. The agents had a choice. They had no knowledge of the homicide. If they admitted killing the decedent, they falsely incriminated themselves. Moreover, since they had no knowledge of the incident, they were not in a position to assert that the killing was required by their duties. Their other alternative was to deny the killing and claim that they did nothing but their federal duty. But asserting that they did nothing but their duty did not necessarily put a federal defense into issue. One court refused to grant removal to an official who denied having committed the charged act, reasoning that the official, by denying having committed the charged act, had failed to allege a defense relevant to

the prosecution. *Compare Illinois v. Fletcher*, 22 F. 776 (N.D. Ill. 1884) with *Oregon v. Wood*, 268 F. 975 (D.Or. 1920), and *State of Alabama v. Peak*, 252 F. 306 (D. Ala. 1918).

Although that ruling may appear unfair, allowing removal based only upon a denial of the charges would have eliminated the federal defense requirement. In most cases, the ruling did not affect officials because they had knowledge of the incident and alleged a federal immunity defense justifying the charged act. *See Tennessee v. Davis*, *supra*, *South Carolina v. Davis*, *supra*. This Court in *Soper (No. 1)* created a means by which officials lacking knowledge of the incident could obtain removal while ensuring that prosecutions based upon acts *unjustifiable* under federal law remained in state courts.

To allow removal by an official lacking knowledge about the incident (the agents), there had to be a means of determining whether the prosecution, either deliberately or mistakenly, had been based solely upon the official's performance of federal duties. Even if the prosecutor's motive was innocently based upon the official's presence at the wrong place at the wrong time (i.e. the agent finding the decedent), such a prosecution would in effect penalize compliance with federal law and violate the Supremacy Clause. The Supremacy Clause would then supply the federal defense justifying removal. Otherwise, States could prosecute federal officials for offenses which they had not committed, knowing that the official would be unaware of the incident and thus be unable to formulate a federal defense sufficient for removal. The problem was how to put this Supremacy Clause defense in issue in the appropriate case.

It was clear that an official claiming no knowledge of the incident should have the burden of producing evidence that his presence and activities as a federal official prompted the prosecution. But too strict a test would require the official to prove his defense in order to proceed to trial in federal court, and would defeat the purpose of removal. And too lax a "causal connection" test would allow any official to obtain removal merely by denying having committed the act and claiming ignorance of the incident prompting prosecution.

The agents in *Soper (No. 1)* denied knowledge of the murder, but argued that they were entitled to removal because they had found the slain man while on duty. This Court fashioned a very strict test allowing the official lacking knowledge about the incident to allege a connection between his federal activities and the prosecution sufficient for removal. The official had to demonstrate the "causal connection" by: 1) detailing all of his actions and showing that each act was in enforcement of federal law; and 2) negating the possibility that he was prosecuted for an act unprotected by federal law.

> There must be a "causal connection" between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of Federal authority *and in enforcement of Federal law*, and he must by direct averment *exclude the possibility* that it was based on acts or conduct of his, *not justified* by his Federal duty. But the statute does not require that

> the prosecution must be for the very acts which the officer admits to have been done by him under Federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, *though mistaken or false*, of the state prosecution.
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> * * * *
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> The defense he is to make is that of his immunity from punishment by the State, *because what he did was justified by his duty under the Federal law*, and because *he did nothing else* on which the prosecution could be based.

Id., at 33, 34 (emphasis added).[11] By showing that each of his acts was indisputably in enforcement of federal law, the official declared that the only basis of the prosecution was either: 1) an act protected by a federal defense;[12] or 2) his mere presence at the scene

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[11] This Court required officials to waive their Fifth Amendment rights and give a complete account of their role in the incident. *Id.*, at 34, 35. Such a waiver would have been unnecessary if an official could obtain removal by alleging only that he was on duty, as such a statement could not be inculpatory.

[12] The "causal connection" test also applied where the official acknowledged having committed the charged act but alleged a federal defense. The Court, in the language quoted above, held that in order to put a federal immunity defense into issue, the official had to negate any inference that the prosecution could properly be based upon an act unprotected by federal law. This explains this Court's denial of removal in *Colorado v. Symes*,

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while enforcing federal law. *Id.* (language quoted above). As noted above, a prosecution based upon his mere presence would provide a Supremacy Clause defense. The phrase "it is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution" (*id.*) was intended to govern *only* those cases where the official alleged a lack of knowledge of the events underlying the prosecution.

That "presence" language required more than simply being on duty. Thus, this Court in *Soper (No. 1)* denied the removal petition because "[t]hese averments amount to hardly more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duties." *Id.*, at 33. ***Petitioners not only misread Soper (No. 1), but rely upon the same allegation that was rejected in that case.***

The language in *Soper (No. 1)* suggests that in order to obtain removal based solely upon the official's presence at the scene, the official must demonstrate that: 1) he committed no acts other than those required by his duties; 2) there was a discernible reason for his prosecution, even though based upon mistake (or animus toward federal authority); and 3) the reason was connected with his having been present carrying out his duties at the time the charged act was allegedly

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[12](...continued)
supra. *See supra* note 9. This Court later relaxed this part of the "causal connection" test for the official immunity defense in civil cases in *Willingham*, *supra*, at n.4. *See infra* note 16. Petitioners do not allege any federal defense.

committed.[13] Petitioners fail to meet this test, and instead rely upon the language used by this Court in *Willingham* to justify removal.

Plaintiff inmate in *Willingham* sued his prison warden and doctor for maltreatment. *Willingham* is confusing because this Court had to reconcile its decision in *Soper (No. 1)* with the relatively new federal defense of official immunity. That doctrine had always shielded legislative and judicial officials for acts performed as part of their judicial functions. But after

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[13] Thus, this Court posed the hypothetical of a prosecution commenced "merely on account of the presence of the officer in discharge of his duties in enforcing the law, at or near the place of the killing, under circumstances casting suspicion of guilt on him. He may not even know who did the killing, and yet his being there and his official activities may have led to the indictment." *Id.*, at 33. This Court stated that removal was proper if the prosecution arose out of the officer's acts committed "under authority of Federal law in the discharge of his duty *and only by reason thereof*." *Id.*, at 33 (emphasis added).

It is not enough to show that the prosecution would not have occurred *but for* the official's physical presence at the scene, because such a test would be tautological. Had our petitioners not been at the scene of accidents by virtue of their driving, these prosecutions would not have occurred. The official must demonstrate that his mere presence enforcing or executing federal law was the proximate cause of the prosecution.

The official in *Soper (No. 1)* alleged that his identity and activity as a federal agent (and not just his presence at the scene as the reporter of the crime), was the proximate cause of his prosecution. This Court stated that such a showing might have been sufficient. However, this Court denied removal because the official had failed to provide enough information to negate an inference that he might have committed an act apart from his duties (i.e. by having shot the slain man). *Id.*, at 35-36.

deciding *Soper (No. 1)*, this Court had expanded that doctrine *for civil suits* to shield all federal officials who could show that the charged acts were committed as part of their official duties. *See Barr v. Matteo*, 360 U.S. 564 (1959).

The official immunity defense is a federal defense because it immunizes federal officials in civil cases; the scope of that immunity is a federal question.[14] However, this federal defense differed fundamentally from other defenses because the official could put it into issue by alleging only that he was performing his duties when he committed the act.[15] This difference posed a problem for lower courts because *Soper (No. 1)* in a criminal case had rejected the idea that an official could obtain removal by alleging only that he was on duty when the charged act was committed. *Soper (No. 1)* required defendant to provide a complete account of the incident and negate any inference that

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[14] This explains the distinction between the instant cases and the hypothetical federal officials posed in petitioners' brief. *See* AB 11-12. The FBI agents, the federal engineer, and the EPA inspector would rely upon official immunity as a defense to a civil suit, and upon federal immunity in a criminal action.

[15] This Court only recently resolved a split among the Circuits by holding that the official must allege that his act was discretionary in addition to having been committed while on duty. *See Westfall v. Erwin*, 484 U.S. __, 108 S.Ct. 580, 98 L.Ed. 2d 619, n.4 (1988). It was assumed in *Willingham* that the warden and doctor had the discretion to impose medical treatment. This Court ultimately allowed removal without requiring the official to allege that the charged act was discretionary. Whether *Westfall* affects the showing required to put the official immunity defense in issue is not relevant here.

he committed an act unprotected by federal law. That an official was on duty was not enough for removal under *Soper (No. 1)*. And there was no reason to believe that *Soper (No. 1)* did not apply to both civil and criminal cases. Thus, even though Congress intended to allow removal of all federal defenses per section 1442(a)(1), the court below in *Willingham* denied removal because it did not recognize official immunity as such a federal defense in light of *Soper (No. 1)*. *See Morgan v. Willingham*, 383 F.2d 139, 141 (10th Cir. 1967) (distinguishing between the breadth of the immunity defense and the scope of removal jurisdiction) (citing *Soper (No. 1)*), *reversed* in *Willingham v. Morgan*, 395 U.S. 402 (1969).

This Court in *Willingham* recognized this new defense of official immunity as a federal defense for purposes of section 1442(a)(1). *Id.*, at 406, 407. But, as in *Soper (No. 1)*, this Court had to determine what facts were sufficient to put that federal defense in issue. *See id.*, at 407-09. This Court was seeking to define what "causal connection" between the official's acts and the civil suit had to be shown in order to demonstrate that the official had a "colorable" official immunity defense. In *Soper (No. 1)*, this Court had required the officials to meticulously detail all of their actions with regard to the victim to negate the inference that an act unprotected by a federal defense was the basis of the prosecution. But such a strict test imposed a burdensome standard in *Willingham* because the defendant prison officials might have had dozens of contacts with plaintiff. *Id.*, at 408-09.

The solution was simple. The official immunity defense covered acts committed in the performance of duties. Thus, that federal defense could be put into

issue by alleging that all contacts between the officials and plaintiffs occurred while the officials were on duty. The Court merely eliminated, *for civil cases only*, the requirement that the official alleging a federal defense negate any inference that he had committed an act unprotected by federal law.[16] But petitioners' confusion arises from the Court's implementation of that decision. This Court elected to employ the "presence" language of the *Soper (No. 1)* decision in allowing removal.[17]

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[16] In *Soper (No. 1)*, even those officials who admitted the charged act and asserted federal immunity defenses had to negate any inference that they were prosecuted for acts unprotected by federal law. *See supra* note 12. This Court relaxed that requirement for civil cases, but stated in footnote 4 that it had not decided whether to relax that requirement for criminal cases. That issue is not presented here because petitioners do not present a federal defense.

[17] "Past cases have interpreted the 'color of office' test to require a showing of a 'causal connection' between the charged conduct and asserted official authority. *Maryland v. Soper (No. 1)*, *supra*, at 33. 'It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution.' *In this case*, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required 'causal connection'. The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times." *Id.*, at 490 (brackets in original, emphasis added).

Note, however, that this Court also made clear that the causal connection test was intended only to define the allegations necessary to put *federal defenses* in issue. "Petitioners sufficiently

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In hindsight, that decision was the source of later confusion. Averring that the official was on duty was sufficient to allege the official immunity defense. It was not sufficient to allege other federal defenses (e.g. federal immunity). But this Court in *Willingham* used some of the same language to define the "causal connection" test for the official immunity defense as it had used earlier in *Soper (No. 1)* to define the "causal connection" test for a defense based upon enforcement of federal law. *See supra* note 17. Lower courts considering cases where the official immunity defense was not available (i.e. criminal cases) could fail to understand that *Willingham* only defined the showing required to put the official immunity defense in issue. They could infer that *Willingham* mandated removal in *all* cases where federal employees merely alleged that they "were on duty, at their place of federal employment, at all the relevant times." *Willingham*, at 409.

However, this Court did limit its ruling to civil suits. *Willingham*, at n.4. *See supra* note 16. And there was no reason to believe that this Court had elected to overrule 100 years of precedent and radically expand federal jurisdiction when its purpose was to create a means of removing a new federal defense. Nonetheless, the Third Circuit read *Willingham* as having eliminated the federal defense requirement. *See Commonwealth of Pennsylvania v. Newcomer*, 618 F.2d

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[17](...continued)
put in issue the questions of official justification and immunity; the validity of their defenses should be determined in the federal courts." *Id.* This Court did not abolish the federal defense requirement.

246 (3d Cir. 1980) ("*Newcomer*").

C. The Third Circuit's Decision Abolishing The Federal Defense Requirement Ignored Congressional Intent And Misinterpreted *Willingham*

The Third Circuit relied upon two arguments in dismantling the federal defense requirement in *Newcomer*. The Circuit stated that the original removal statutes "were enacted not so much to provide federal forums for federal defenses, as to protect federal officers from interference with the operations of federal government by the state." *Id.*, at 250. But this Court in *Willingham* did not suggest that view of legislative intent, and the Third Circuit presented no legislative history supporting it.[18]

The Circuit's second argument contradicted its first. Instead of relying upon its view of Congressional intent, the Circuit stated that "the liberal construction to be afforded the statute, *see Willingham*, at 406; *Colorado v. Symes*, 286 U.S. at 517, 52 S.Ct. at 637,

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[18] The Third Circuit relied instead upon *Tennessee v. Davis*, *supra*, and Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U.Pa.L.Rev. 793 (1965). As discussed above, the legislative history indicates that Congress was concerned with protecting federal law against State interference. Moreover, Professor Amsterdam cited *Davis* as an example of the rule under section 1442(a)(1) that the official must show colorable protection under federal law. *See supra* note 7. And the Third Circuit conceded that the official in *Davis* had alleged a federal defense. *Newcomer*, at 250.

and the interpretation of 'color of office' supplied by *Willingham compel* our result in this case." *Id.*, at 250 (emphasis added). Specifically, the Circuit relied upon the holdings in *Willingham* and *Soper (No. 1)* that the official need not admit that he committed the charged act in order to obtain removal. The Circuit reasoned that "in such a case, of course, the denial does not involve a federal defense." *Newcomer*, at 250. But *Soper (No. 1)* requires that such a denial must be accompanied by facts establishing a "causal connection" between the prosecution and the official's enforcement of federal law sufficient to implicate the Supremacy Clause. The denial ***is*** the allegation of a federal defense.

D. This Court's *Dicta* in *Arizona v. Manypenny* Supports The Federal Defense Requirement

Petitioners' attempt to deny the importance of federal immunity in *Arizona v. Manypenny*, 451 U.S. 232 (1981), is unconvincing. Although an immunity defense had not been alleged at trial, this Court assumed that the removal petition had made out a claim of federal immunity *and* that such a defense was necessary for removal.

> Federal involvement is necessary in order to insure a federal forum, but it is *limited* to assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law. Thus, while giving full effect to the purpose of removal, this Court retains the highest regard for a State's right to make and enforce its own criminal laws.

Id., at 242-43 (emphasis added).[19]

III.
ARTICLE III PROHIBITS REMOVAL OF CASES LACKING A FEDERAL DEFENSE

Article III, section 2, extends federal jurisdiction only to those cases "arising under" the laws or Constitution of the United States. *Id.* Article III on its face does not allow removal of these traffic cases because petitioners fail to raise federal defenses. California has argued that a reasonable construction of section 1442(a)(1) avoids the obvious constitutional difficulty posed by the absence of federal issues in these cases. *See Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984) (this Court will first determine whether a reasonable construction of the statute supporting the constitutionality of the statute exists). Should this Court disagree, California reluctantly requests this Court to declare section 1442(a)(1) unconstitutional insofar as it purports to confer federal jurisdiction in this case.

The dissent below suggests that the cases "arise under" Article III because the officials were employed to perform duties that were authorized by federal law. *See Mesa*, at 968 (Noonan, J., dissenting) (citing *Osborn v. Bank of the United States*, 22 U.S. 738, 823

[19] By "state-law questions", the Court referred to remaining defenses available to defendant under state law in addition to the federal immunity defense (e.g. lack of criminal intent, identity, etc.). *Id.*, at 241-42.

(1824) ("*Osborn*")). *Osborn* does not support jurisdiction here. The only other basis for jurisdiction beyond *Osborn* is the controversial and dubious theory of "protective jurisdiction".

A. Even The Broad Reading of "Arising Under" Jurisdiction Propounded In *Osborn v. Bank of United States* Does Not Confer Jurisdiction In This Case

Osborn has been described as reflecting a "broad conception" of Article III jurisdiction. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983). However, this Court has refused to hold that *Osborn* allows Article III jurisdiction over cases presenting only "potential" federal issues. *Verlinden*, at 492-93 (declining to decide whether "a mere speculative possibility that a federal question may arise at some point in the proceeding" is sufficient under Article III). The holding and reasoning of *Osborn* demonstrates that only those "potential" issues which are necessarily implied by plaintiff's complaint "arise" under Article III.

There are two types of cases which must be kept separate. First, there are cases where the character of the action always presents federal issues. These issues are "potential" because they may or may not be asserted, or "raised", by one or both of the parties in the action. Such issues may be so well-settled that it is highly unlikely that they will be "raised" by the parties (e.g. the right of the Bank of the United States to sue or contract). However, these issues are present at the outset of the case because it is apparent from the facts presented in the complaint (i.e. the status of the Bank

as a federal instrumentality) that the rights of the parties are dependent upon the resolution of those issues. The "original ingredient" test established by *Osborn* confers jurisdiction in such cases.[20]

The second class of cases encompasses suits where the facts of the case stated in the complaint do not automatically raise federal issues. Such cases can "arise under" Article III only if a party "raises" a federal issue that is dispositive of that lawsuit.[21] In the absence of an "original ingredient", *Osborn* does not allow a party to create jurisdiction merely by stating a set of facts from which a federal issue might, or might not, arise upon the development of other facts. *See Little York Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 203 (1887) (construing Justice Marshall's

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[20] This was the point of contention between the majority and dissent in *Osborn*. Justice Johnson, dissenting, stated that a federal issue did not "arise" for purposes of Article III until a party "raised" the issue. *Id.*, at 888-889. Justice Marshall decided that issues necessarily implied by the complaint, though well-settled and not raised by either party, presented federal issues sufficient for jurisdiction. *Id.*, at 824-25. But neither Justice Marshall nor Justice Johnson suggested that issues which were not necessarily implied by plaintiff's complaint, but could conceivably appear later in the action depending upon facts later presented, could serve as the foundation for Article III jurisdiction. *Id.*, at 825. *See Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 509-10 (1900) (interpreting *Osborn*).

[21] Although *Osborn* was read in later cases as having provided federal jurisdiction for suits against instrumentalities, that jurisdiction was based upon the requirement that plaintiff allege defendant's corporate and federal status in the complaint. *See Texas & P.R. Co. v. Cody*, 166 U.S. 606, 609-10 (1897).

language in *Osborn* as preventing removal under the admittedly narrower general federal question removal statute where a federal question only *might* be presented at a later point in the litigation).

Turning to the issue presented here, petitioners' status is not an "original ingredient" in these prosecutions. California is not required to allege that defendants are federal officials. California may prevail without first proving that petitioners did not act in enforcement of federal law, just as a plaintiff in an ordinary contract action need not show that his contract is unaffected by federal law. Furthermore, while the Bank's status created an actual federal issue in *Osborn*, petitioners' status as federal employees does not do so here. Federal employees are not "creatures of federal law" (*Osborn*, at 823), and the fact that they are employed by the United States when they commit the charged act does not create a federal issue. Justice Marshall recognized that the mere status of the Bank as an entity created by the United States could not by itself create federal jurisdiction.

> It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank. *This distinction is not denied.*

Id., at 826-27 (emphasis added). The same must be true for persons employed by an entity created by federal law, or else Article III jurisdiction would extend

to all suits by federal employees arising out of off-duty activities. Indeed, Justice Marshall's concession was prompted by the dissent's argument that focusing upon the identity of the party instead of the issues raised by the case would create jurisdiction for any case involving federal officials. *Id.*, at 901-02. Justice Marshall did not rely upon the status of the Bank to create jurisdiction directly, but upon the fact that the Bank's status created federal questions concerning all of its acts, including its right to sue. *Id.*, at 827. Thus, petitioners' employment, without more, cannot serve as the basis for Article III jurisdiction.

The petitions also fail to raise a federal issue. Since petitioners did not assert that their charged acts (negligent driving) were justified under the laws authorizing their duties, the issue of whether they acted in their official capacity cannot be in dispute. A case cannot "arise under" a law that is irrelevant to the disposition of the action. To argue that Article III jurisdiction encompasses such acts because they were committed "within the scope of his employment" begs the question. *See e.g. Mesa*, at 968 (Noonan, J., dissenting). Assume that a mail carrier drives his truck down the sidewalk, running over pedestrians. The mail carrier's actions other than the charged act may have been committed within the scope of his employment. But the issue of whether his hitting pedestrians was within the scope of employment for purposes of a criminal action is an issue to be raised via federal defense (i.e. justification under federal law), and only then decided.

In our cases, simply stating that hitting a bicyclist (or a police car) was an act committed within the "scope of employment" does not put the laws

authorizing those duties into issue. Petitioners certainly do not contend that those laws authorized the negligent driving charged herein. (If they do, then the District Court erred by allowing removal based upon such a frivolous defense contrary to 28 U.S.C. 1446(a)(4) and (5)). Rather, petitioner Mesa alleges that the accident occurred "*while* defendant was on duty and acting in the course and scope of her employment." (J.A. 5) (emphasis added). Mr. Ebrahim's petition merely states that he was on duty. (J.A. 10). Stating that the alleged criminal act occurred while they were discharging their duties does not present a federal issue because it says nothing about why the particular charged act was committed; petitioners only tell us that they were doing other proper things when the incident occurred. "Scope of employment" in practice means nothing more than that the official was on duty.

The phrase "scope of employment" appears to have been borrowed from official immunity cases, where the official may assert a federal defense in a *civil* suit by showing that he had the discretion to commit the act by virtue of his federal authority. *See Westfall v. Erwin*, 484 U.S. __, 108 S.Ct. 580, 98 L.Ed. 2d 619 (1988). But facts which raise federal issues in such cases do not necessarily raise them in criminal actions. A simple statement that the official was on duty in a typical civil case may well raise a federal issue sufficient for removal because it actually alleges a federal defense. *See Willingham v. Morgan*, 395 U.S. 402, 409 (1969). But the same statement in these criminal cases does not raise a federal defense. Thus, federal jurisdiction is lacking.

B. This Court Should Decline Petitioners' Invitation To Adopt Protective Jurisdiction As A Basis For Federal Jurisdiction Over Traffic Tickets

This Court has not found it necessary to embrace protective jurisdiction in the more than 200 years since Article III was written. *See e.g. Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 491-93 (1983), *Northern Pipeline Construction. Co. v. Marathon Pipeline Co. and United States* 458 U.S. 50, 72-74 (1982) (rejecting federal jurisdiction based upon Article I). Petitioners invite this Court to abandon a reasonable construction of section 1442(a)(1) to create a special district court for federal employees. To accept this invitation would be unsound because the theory is suspect and the consequences unpredictable.

There appear to be two theories of protective jurisdiction. First, that Congress may provide jurisdiction over any case where it has the power under Article I to enact laws governing the outcome of that case. *See* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law and Contemporary Problems, 216, 224-25 (1948). Second, that Congress has the power to create a federal forum to protect federal "interests". *See* Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U.L. Rev. 933 (1982).

Justice Frankfurter discussed the limits of Professor Wechsler's theory.

> But, under the theory of 'protective jurisdiction', the 'arising under' jurisdiction of the federal courts would be vastly extended. For example, every contract or tort arising out of a

> contract affecting commerce might be a potential cause of action in the federal courts, even though only state law was involved in the decision of the case.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481-82 (1956) (Frankfurter, J., dissenting).[22] Moreover, even such an all-inclusive theory does not include our cases because Congress lacks the power under Article I to enact federal criminal laws preempting those state laws which govern prosecution of ordinary traffic offenses.[23] Finally, adherents of this theory indicate that Congress provides jurisdiction by moving to

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[22] *See Northern Pipeline*, at 72-74. The majority in *Lincoln Mills* did not reach our Article III issue because it held that the challenged statute directed federal courts to fashion federal common law in that area. *Id.* Congress did not intend section 1442(a)(1) to create federal law governing suits and/or prosecutions of federal officials.

[23] The Commerce power is unaffected by the choice of forum for prosecution of federal officials for acts unrelated to federal authority. Extending jurisdiction on the basis that a guilty verdict might sideline a federal employee would extend jurisdiction to all cases involving employees arrested while off-duty. This was the result Justice Marshall chose to avoid in *Osborn*. The postal power (Art. 1, sec. 8) is also unaffected by the choice of forum for trial of mail carriers. Indeed, this Court has questioned the constitutionality of federal statutes preventing execution of state felony warrants against carriers actually *delivering* mail. *See United States v. Kirby*, 74 U.S. 482 (1868). The United States fisc cannot be affected by a guilty verdict because the United States cannot be the subject of non-mutual offensive collateral estoppel. *See United States v. Mendoza*, 464 U.S. 154 (1984).

protect its regulation of an area. *See* Mishkin, *The Federal Question in the District Courts*, 53 Colum. L. Rev. 157, at 184-96. Congress has heretofore not invaded State sovereignty over State criminal law, and has no policy concerning federal officials charged with acts unrelated to their federal authority.

The theory that Congress may provide jurisdiction based upon its "interest" in providing a federal forum for federal officials has been rejected by this Court. In *Verlinden B.V. v. State Bank of Nigeria*, *supra*, this Court noted that a jurisdictional statute could not serve as the federal statute under which the case arises under Article III. *Id.*, at 496. Since this species of protective jurisdiction is based upon a "federal interest", and not an actual federal statute, the only federal law available for the case to "arise under" would be the jurisdictional statute.

In addition, protective jurisdiction stretches the "arising under" language of Article III past the breaking point because cases would not arise under "the law and Constitution", but under "federal interests". "The law and Constitution" is definable; "federal interests" mean whatever Congress or the courts say they mean at a particular time. Moreover, the rationale behind this "forum-based" jurisdiction does not extend to the instant cases because the United States has no legitimate interest in conferring jurisdiction over federal officials acting outside of their official capacity.[24] The

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[24] *But see Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 475 (Frankfurter, J., dissenting). Justice Frankfurter argued that the limits of federal distrust of state courts had to be the Constitution as expressed by Article III (i.e. diversity jurisdiction). (continued...)

United States has no interest in providing federal jurisdiction for those who do not contend that their prosecution seeks to penalize compliance with federal law or obstruct the operations of the United States.

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[24](...continued)
As part of that argument, he discussed section 1442(a)(1). He first properly distinguished the removal statute by finding that the statute had been interpreted as requiring a federal defense. *Id.*, at 475 n. 5 ("that put federal law in the forefront as a defense") (interpreting *Tennessee v. Davis*, *supra*). Thus, petitioners receive no comfort from Justice Frankfurter.

However, Justice Frankfurter also attempted to provide an alternate, and incorrect, rationale accounting for section 1442(a)(1). "In any event, the fact that officers of the Federal Government were parties *may* be considered sufficient to afford access to the federal forum. *See In re Debs*, 158 U.S. 564, 584-86 (1895); Mishkin, 53 Col. L. Rev., at 193: 'Without doubt, a federal forum should be available for all suits involving the Government, its agents and instrumentalities, regardless of the source of the substantive rule.' " *Lincoln Mills*, at 482 n.5. (emphasis added).

Justice Frankfurter's use of the word "may" indicates some uncertainty about this pronouncement. In addition, he appears to have misinterpreted the quotation from Professor Mishkin's article as referring to federal officials instead of government agencies. *See Mishkin*, *supra*, at 193. Or Justice Frankfurter may have assumed that federal officials would be acting in their official capacities when suing or being sued. *Id.* He appears not to have considered the possibility that the official might have been on duty but acting outside of his official capacity (i.e. without a federal defense). Thus, Justice Frankfurter's only support for that statement (aside from Mishkin) was *In re Debs*, *supra*, which held that Congress could apply to the courts for an injunction against activities interfering with its Article I powers over interstate commerce. *Id.*

IV.
THIS COURT SHOULD REFUSE TO CREATE A SPECIAL FEDERAL COURT FOR FEDERAL EMPLOYEES AT THE EXPENSE OF STATE SOVEREIGNTY

This case turns on the proper construction of a statute. Petitioners' reliance on policy considerations is misplaced because the intent of Congress is clear. However, since petitioners invoke federal interests in support of removal, California urges that allowing removal would burden the federal courts at the expense of State sovereignty.

> The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. This Court has emphasized repeatedly "the fundamental policy against federal interference with state criminal prosecutions."

Kelly v. Robinson, 479 U.S. __, 107 S.Ct. 353, 360 (1986) (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)). This Court should not abrogate that policy by insulating federal employees from State judicial process where there is no challenge to federal authority.

The instant cases are excellent examples of why this Court should not construe section 1442(a)(1) to allow removal to all on-duty employees. Both are traffic cases; one is a simple traffic ticket. These cases were removed even though petitioners do not allege local or State hostility to mail carriers or federal law. Many federal officials will seek to remove such cases, not because of concerns over harassment, but to gain a tactical advantage.

For example, in California and other large states, the distance between a particular county and the nearest federal court may be measured in hundreds of miles.[25] Very few county prosecutors can afford to spend the time and money necessary to contest minor infractions in federal court. Fewer witnesses will be willing or able to travel long distances. Many offenses may be dismissed or compromised because prosecutions have been removed.

Removal in inappropriate cases injures Federal and State governments. Federal courts will be burdened with hundreds or thousands of new cases each year presenting no issues of federal law, including traffic tickets. *Pro se* litigants with distinctive and uninformed views about our Constitution and legal system can be expected to make a federal case out of a traffic ticket.

The spectacle and expense of a separate criminal court for federal employees are themselves good reasons for restricting removal. But such cases will also generate numerous appeals because there is little guidance available concerning the trial of removed cases in federal courts. It appears that district courts are forced to provide most protections available under State law to criminal defendants even where those protections conflict with federal criminal procedure. *See City of Aurora v. Erwin*, 706 F.2d 295 (10th Cir.

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[25] In California, the county seat of Del Norte County is Crescent City. Crescent City is in the Northern District of California. The nearest federal court within that district is over 350 miles away in San Francisco. Many other county seats are located over 100 miles away from their respective federal district courts.

1983) (reversing conviction because defendant was not afforded a jury trial guaranteed under Colorado law). Conflicts between federal and state criminal procedure will raise issues of first impression and create errors requiring reversal or retrial. Differences between federal procedure and procedure mandated by each of the fifty States' constitutions concerning, *inter alia*, discovery, voir dire, and jury instructions will spawn confusion and appeals.[26]

Finally, petitioners urge that section 1442(a)(1) and the federal defense requirement will disrupt "federal government functions" and leave officials vulnerable to harassment by States hostile to federal authority. But federal officials alleging harassment have effective remedies. This Court allows federal officials to obtain removal by pleading the facts suggesting harassment. As discussed above, the official need only show that

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[26] Any State retaining independent and adequate state grounds based upon its constitution may present conflicts with federal criminal procedure. State Supreme Courts have handed down at least 450 decisions based upon State constitutions which conflict with federal law, and the majority of those decisions involve criminal cases. Collins, Galie, Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 Hastings Const. L.Q. 599, 613 (1985-86), Wermiel, *State Supreme Courts Are Feeling Their Oats*, Wall St. Journal, June 15, 1988, at 1, col. 1, (updating the Hastings article), Collins and Galie, State Constitutional Law Insert to The National Law Journal, September 29, 1986, S-8 (listing some of those cases sorted by category). Moreover, the definition of state "substantive law" may encompass state statutes, as well as State constitutional provisions. *See Virginia v. Felts*, 133 F. 85 (C.C. Va. 1904) (suggesting that State rules of evidence, voir dire, and sentencing must prevail over federal law).

his actions were in enforcement of, or compliance with, federal law and negate the possibility that he was prosecuted for an act unprotected by federal law. *See Soper (No. 1)*, *supra*, at 33-34. Congress can amend section 1442(a)(1) if this standard is considered too burdensome. *See e.g. Maryland v. Soper (No. 2)*, 270 U.S. 36, 43-44 (1926). Finally, the Ninth Circuit below specifically stated that it might have allowed removal had petitioners alleged harassment. *Mesa*, *supra*, at 967.

Moreover, the writ of *habeas corpus* is an equally potent weapon against harassment. *See* 28 U.S.C. 2241(c)(2) and (c)(3). *See In re Neagle*, 135 U.S. 1 (1890). Federal officials may apply for the writ before trial. *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906). Instead of having to prevail at an evidentiary hearing and again at trial (*see* 28 U.S.C. 1446(a)), the successful official is released immediately after the hearing on the writ. *Id.* The official need only show that the prosecution was motivated by animus toward the performance of federal duties. *See e.g. People of the State of California v. Morgan*, 743 F.2d 728, 731 (9th Cir. 1984). Thus, this Court's decision reaffirming the federal defense requirement will not affect the remedies available to federal officials claiming harassment.

In sum, requiring a federal defense for removal preserves Congressional intent and over 100 years of this Court's precedent. Affirming the judgment below will protect the legitimate interest of the United States in ensuring enforcement of federal law without invading State sovereignty.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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